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Version of attached file:

Published Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Baker, A. (2005) 'A tale of two projects : emerging tension between the public and private aspects of employment discrimination law.', *International journal of comparative labour law and industrial relations.*, 21 (4). pp. 591-627.

Further information on publisher's website:

<http://www.kluwerlawonline.com/abstract.php?area=Journalsid=IJCL2005028>

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A Tale of Two Projects: Emerging Tension between Public and Private Aspects of Employment Discrimination Law

Abstract: Zeal for curing the public ill of discrimination can lead to approaches that ignore the more private concerns of individual victims of discrimination. This article explains that the forward-looking project of changing society to eliminate inequality is quite a different project from that of providing accessible and effective individual remedies for discrimination victims. To that end, the nature and divergence of these two projects is described in abstract terms, and then concretely illustrated by reference to US employment discrimination law, where a clear conflict has evolved between the two. The article then traces the development of anti-discrimination law in Great Britain, and the subtly emerging tension between the two projects here. Finally, the article assesses the contemporary discourse on reform of equality law in Britain, and suggests how a new single equality act might drive for social change without eroding the benefits of the existing system for individual dispute resolution.

1. INTRODUCTION

Anti-discrimination law in Great Britain faces a period of dramatic change. The UK government completed a consultation process, in November 2004, on the creation of a new Commission for Equality and Human Rights ('CEHR') to take over the enforcement of equality and human rights in England, Scotland, and Wales; the consultation continues at the time of

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writing.¹ The CEHR will have responsibility for administering new positive duties to promote racial equality recently imposed on public bodies by the Race Relations (Amendment) Act 2000.² It must also help enforce new regulations against sexual orientation and religion and belief discrimination in the workplace, and pending regulations against age discrimination in employment, on top of established prohibitions against race, sex, and disability discrimination in employment, education, and goods and services.³ This unification of enforcement responsibilities under the aegis of a single agency could represent the first step in a move towards a single equality act, called for by several leading commentators to harmonise the often conflicting strains of the UK's piecemeal approach to regulating discrimination.⁴ Some see a single equality act as an opportunity to extend protection in education, goods, and services to the new strands; others would add to that by giving jurisdiction for all individual complaints of discrimination, even those falling outside the sphere of employment, to the existing employment tribunals.⁵ This pressure to broaden and integrate equality law means that tensions already present in employment law, between public policy implementation and dispute resolution, could foreshadow or even precipitate developments across discrimination law well beyond employment.

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- 1 *Fairness for All: a New Commission for Equality and Human Rights*, DTI, May 2004, <<http://www.dti.gov.uk/consultations/files/publication-1193.pdf>> ('CEHR White Paper'). Government response to the CEHR White Paper Consultation, DTI, 18 November 2004 <http://www.womenandequalityunit.gov.uk/equalityproject/consultation_govtresponse_nov2004.doc>. The CEHR will take over the responsibilities of the existing Commission for Racial Equality (CRE), Equal Opportunities Commission (EOC), and Disability Rights Commission (DRC). Northern Ireland has its own single equality body, the Equality Commission for Northern Ireland, which enforces a single equality act for Northern Ireland that could provide a template for a similar act in Great Britain. As this paper focuses on the debate over a single equality act in England, Scotland, and Wales, the arrangements for equality regulation in Northern Ireland will not receive direct attention.
 - 2 *Ibid.*, p. 46.
 - 3 *Ibid.*, pp. 32-35.
 - 4 See *Why Does Britain Need a Single Equality Act?* London, Equality and Diversity Forum, 2003, <<http://www.equalitydiversityforum.org.uk/equact.htm>>; *Which Way Equality?*, London, Commission for Racial Equality, 2002; Joint Parliamentary Committee on Human Rights, *Commission for Equality and Human Rights: Structure, Functions and Powers: Eleventh Report of Session 2003-2004*, London, HMSO, 2004; S. Fredman, *Discrimination Law*, Oxford, OUP, 2002, pp. 91, 176-194 ('Fredman'); C. Barnard and B. Hepple, 'Substantive Equality', *CLJ*, Vol. 59, 2000, p. 562; A. McColgan (ed.), *Achieving Equality at Work*, London, IER, 2003, pp. 133-134; C. O'Conneide, *Taking Equal Opportunities Seriously: the Extension of Positive Duties to Promote Equality*, London, Equality and Diversity Forum, 2004, pp. 6-13 (*Seriously*); G. Moon, *Why do we need a Single Equality Act?*, London, Justice, February 2003.
 - 5 *Ibid.*; B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework – The Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Oxford, Hart, 2000, rec. 41 ('Hepple Report').

Now is the time, as the CEHR takes shape and debate on the content of a single equality act intensifies, to address emerging conflicts in the present system for enforcing employment discrimination law. The reform discussion must answer a central question of how many tasks a new act should ask employment tribunals to perform. If a single equality act will impose new pressures on the employment tribunals, it becomes crucially important that the reform discourse recognise the existence and nature of the two projects whose ends the tribunals serve. The first project is that of providing cheap, quick, and accessible remedies to individual victims of discrimination. This 'dispute resolution project' differs markedly in aims and justification from the second project – the 'social change project' – which seeks through anti-discrimination regulation, among other methods, to bring about structural change in society, specifically the elimination of inequality.⁶ Both projects are part of a scheme for dealing with discrimination as a social ill. However, the dispute resolution project focuses on the primarily private matter of one individual seeking compensation from another individual or institution for the commission of a wrong. The social change project, on the other hand, concerns itself with the essentially public matter of implementing a social policy against discrimination. These two projects often work in harmony, and each necessarily contributes to the mission of the other. However, the projects can also find themselves in tension, and probably will if the new CEHR pursues a strong strategy of deterrent litigation in tribunals already reeling from expanded jurisdiction. Unfortunately, the existence and potential inconsistency of these two projects has received little attention in recent scholarship on the reform of discrimination regulation.⁷

Ignoring the distinct nature and aims of the two projects could lead to erosion of the speed, affordability, and accessibility of discrimination deci-

6 O. Fiss, 'Forms of Justice', *Harvard LR*, Vol. 93, 1979, p. 1. The concept of the two projects is the author's invention, but it is underpinned by O. Fiss's distinction between the 'dispute resolution' and 'structural reform' functions of adjudication.

7 There has been extensive discussion in recent years at the international level about making enforcement institutions accessible and effective for victims of discrimination, but it takes place in the context of developing primarily aspirational norms to guide national enforcement. See, e.g. Mc. Crudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in S. Fredman (ed.), *Discrimination and Human Rights. The Case of Racism*. Oxford, OUP, 2001. These norms have not found many mainstream voices in the domestic debate.

Examples of important reform contributions that pay little attention to the two projects include H. Collins, 'Discrimination, Equality and Social Inclusion', *Mod. Law Rev.*, Vol. 66, 2003, p. 16; C. O'Cinneide, *A Single Equality Body: Lessons from Abroad*, Manchester, EOC, 2003 ('O'Cinneide'); A. McColgan, n. 4 *supra*; CEHR White Paper, n. 1 *supra*; S. Fredman, n. 4 *supra*, Hepple Report, n. 5 *supra*.

sions before employment tribunals. The threat comes in the form of calls for measures intended to improve the effectiveness of tribunal litigation as a tool of policy implementation, such as intensified equality commission strategic litigation, class or representative actions and exemplary damages.⁸ There can be no doubt that UK employment discrimination law needs to strengthen its impact on the structural causes of inequality. However, tinkering with the inputs to the system of tribunal claims, with an eye toward improving its deterrent outputs, will almost certainly have effects on its individual remedy function as well. It may well be that a significant, negative impact on the availability of individual relief is a price we are willing to pay for stronger deterrence, but some measures in support of the social change project are more likely to harm the dispute resolution project than others. The reform discourse must deliberate more carefully on whether the employment tribunal system, as presently constituted, should be the forum for the more popular modern policy implementation methods.

I do not argue against increasing the deterrent impact of anti-discrimination law or against the use of modern enforcement methods – I favour both. Instead, I seek to point out some of the unintended consequences such approaches might have for individual dispute resolution in the tribunals and to encourage consideration of alternative strategies or forums. To demonstrate the significance of the two projects to the current reform context, Section 2 analyses the nature of the two projects, and how they can conflict. Section 3 illustrates this conflict by using the United States as an example. The section begins by explaining why the US experience can shed light on a British problem set in a European context. It then argues that US failure to reconcile the two projects has left most individual victims without a public forum for their claims, and has provoked the evolution of an active dispute resolution movement often at odds with social change aims. Section 4 analyses the evolution of employment discrimination law in Great Britain in light of that example, with special attention to the role of tribunal claims in the scheme for combating inequality in the workplace.

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- 8 M. Bell, *Anti-Discrimination Law and the European Union*, Oxford, OUP, 2002, pp. 183-190; P. Skidmore, 'The EC Framework Directive on Equal Treatment in Employment; Towards a Comprehensive Community Anti-Discrimination Policy?' *ILJ*, Vol. 30, 2001, p. 126; C. McCrudden, D. Smith, and C. Brown, *Racial Justice At Work: Enforcement of the Race Relations Act 1976 in Employment*, London, Policy Studies Institute, 1991, pp. 281-282 ('McCrudden *et al.*'); L. Dickens, 'Anti-discrimination Legislation: Exploring and Explaining the Impact on Women's Employment' in W. McCarthy (ed.), *Legal Intervention in Industrial Relations: Gains and Losses*, Oxford, Blackwell, 1992, pp. 121-123; A. Leonard, *Judging Inequality: the Effectiveness of the Tribunal System in Sex Discrimination and Equal Pay Cases*, London, Cobden Trust, 1987, pp. 141-145; S. Fredman, n. 4 *supra*, pp. 174; B. Hepple Report, n. 5 *supra*, rec. 44.

This reveals some worrying parallels with the US experience, and sets up an assessment, in Section 5, of the contemporary reform discourse in Great Britain, focusing on the lack of attention the two projects receive in the British debate. The article concludes by recommending directions for a single equality act that could avoid the tension between the two projects.

2. THE NATURE AND DIVERGENCE OF THE TWO PROJECTS

2.1. *The Two Projects*

The idea that society's response to employment discrimination consists of (at least) two separate projects has not received much attention, so surely some readers will ask what makes them 'projects'. One could describe a scheme for dealing with discrimination as involving various 'elements' or 'functions', all of which need attention according to their relative status in the policy priorities. Providing mechanisms for individuals to redress acts of discrimination against them might merely make up one of the arrows in the quiver of a robust approach to combating discrimination as a social problem. However, that view ignores the inherent value placed on the availability of a forum for the individual to vindicate his or her rights. If a hypothetical equality regime employs two independent measures – say, public procurement contract compliance and equality commission investigations of suspected patterns or practices – and a review of the system indicates that the two do not work well together, it might be proper to curtail or eliminate one of the programmes, if that would make the fight against discrimination more effective. Nobody would miss the lost or limited programme, provided the overall social change aims moved forward. In this example, contract compliance has no essential social worth other than its instrumental value as a tool for policy implementation.

On the other hand, the availability of formal, public adjudication to the effect that one person has wronged another has value for reasons that go beyond its role in delivering a broader policy outcome. Indeed, the accustomed form of adjudication in common-law countries evolved from a demand by the wronged for a venue to air their grievances, to receive public recognition of their status as 'the wronged', and to have the wrongdoer identified as such.⁹ This separate worth of the right to an individual

9 K. Laster and P. O'Malley, 'Sensitive New-age Laws: The Reassertion of Emotionality in Law', *IJ Soc. of Law*, Vol. 24, 1996, pp. 21, 23-24; see also, N. Bohler-Muller, 'What Equality Courts Can Learn from Gilligan's Ethic of Care: A Novel Approach', *SAJHR*, Vol. 16, 2000, p. 623.

remedy subsists even where the legal entitlement to relief came into existence solely to advance social change objectives. Once government grants justiciable rights among private parties as a policy implementation measure, it releases something it cannot altogether control. It retains the prerogative to augment the right, or to add other programmes or measures to its overall scheme, but the right is now out there and cannot easily be retracted. The obvious political unpalatability of canceling a right is heightened with rights such as equality, where granting a right of action actually recognised a substantive right already deemed to exist.¹⁰ In short, individual rights of action have a life of their own outside the policies they advance.

An interesting question arises – which must be left for subsequent empirical and theoretical study – as to (a) what, essentially, we value about the right to seek a judgment in our favour and (b) what functions ought to be served by the institution of individual claims for compensation. ‘Compensation’ provides one obvious answer to both questions. There is increasing acknowledgement, however, of the role of public dispute resolution in healing important community relationships,¹¹ clearing one’s name,¹² or enhancing inclusion or democratic participation.¹³ Public hearings leading to public declarations of responsibility deliver benefits that compensation secured through mediation, conciliation, or even arbitration cannot.¹⁴ It is true that these forms of alternative dispute resolution (ADR) owe much of their popularity to the fact that they relieve the participants of several obvious disadvantages of public litigation, such as cost, delay, antagonism, legalism, and the stress attendant to each of those characteristics.¹⁵ However, as this article argues, many of those disadvantages exist in their present degree because the objective of quick, cheap, and accessible remedies has not received the priority it deserves. Moreover, the point here is not that public hearings are the only desirable way of resolving discrimination claims, but that even a system replete with attractive ADR options must have as its backdrop an acces-

10 See, e.g. the Preamble to the Universal Declaration of Human Rights.

11 See, e.g. N. Bohler-Muller, n. 9 *supra*, pp. 627-632; O. Fiss, ‘Against Settlement’, *Yale LJ*, Vol. 93, 1984, pp. 1073, 1085-1088 (‘Against Settlement’).

12 *Routes to Resolution: Consultation Document on Proposals for Employment Act 2002 (Dispute Resolution) Regulations*, London, DTI, July 2003, para. 2:11 (*Routes*).

13 *Modernising Justice-the Government’s Plans for Reforming Legal Fairness and the Courts*, London, Lord Chancellor’s Department, 1998, Foreword; S. Fredman, n. 4 *supra*, pp. 22-23, 181-182.

14 See, e.g. ‘Against Settlement’, n. 11 *supra*, pp. 1076-1078.

15 See A. Baker, ‘Access v. Process in Employment Discrimination: Why ADR Suits the US but not the UK’, *ILJ*, Vol. 31, 2002, p. 113 (‘Access v. Process’); A. Leonard, n. 8 *supra*.

sible public forum. True vindication of a right calls for more than a payout from the person who violates that right: it requires at least a realistic choice of a public airing of the grievance and an assessment of fault.

2.2. *Their Divergence*

Clearly, if the two projects value dispute resolution for different reasons, a dissonance can arise. The potential for conflict becomes apparent upon consideration of what it means to engage in the dispute resolution project (DRP) or the social change project (SCP). Participation in the SCP involves seeking, and implementing, answers to the question, ‘how do we best discourage employers from discriminating (or encourage practices consistent with substantive equality)?’ This overarching question can lead to more specialised questions about tribunal procedure or damages remedies, but the answers will always turn on what approach best suits social change objectives. The DRP, on the other hand, asks, ‘how do we make the process of seeking redress for wrongs – and of defending such petitions – less of a miserable, discouraging, and ultimately pointless experience for the parties?’ or something to that effect. The DRP answers questions about procedure or remedies with an eye toward what will make things easy or fair for the parties – claimants and respondents. Thus, for example, a classic DRP concern with quiet, private resolution would tend to conflict with a SCP interest in sending deterrent messages to society.¹⁶

The fact that the two projects can conflict should not obscure the fact that they often interrelate. Distinguishing between the two projects does not mean that every aspect of equality law falls into the category of pursuing one project or the other. For example, individual claims affect the behaviour of respondents, sometimes causing them to rethink their employment policies, and thus dispute resolution obviously impacts on social change.¹⁷ Similarly, successful test cases in aid of the SCP educate the judiciary and provide clarification of the law, potentially making dispute resolution more straightforward. The removal of limits on compensation awards has SCP and DRP aspects, giving litigation more deterrent bite as well as allowing compensation awards to reflect all of the harm suffered by the victim. Indeed, whether an argument for higher damages has an SCP or a DRP flavour depends on the reasons offered in support: the SCP argument cites deterrence while the DRP argument refers to appropriate compensation. For this reason the two projects cannot serve as

16 ‘Against Settlement’, n. 11 *supra*, p. 1074 and fn. 9.

17 B. Hepple Report, n. 5 *supra*, app. 1.

labels for individual commentators or even for particular proposals. Instead, 'SCP' and 'DRP' categorise purposes for which to advance a given proposal, and the justifications used in support of it. Therefore the reason for delineating the two projects is not to identify two very separate camps, or schools of thought, or even kinds of approach to regulating discrimination, but to help understand why some of the things reformers want to do for one purpose might have negative effects on the ability of the regulatory system to serve the other purpose. In a sense, as the US example below indicates, the DRP represents a reaction – a very appropriate and useful reaction – to SCP approaches that threaten the continued availability of an accessible, user-friendly dispute resolution system.

3. THE EVOLUTION OF THE TWO PROJECTS IN THE US

The arrangements in the US for resolving employment discrimination disputes, and for imposing deterrent pressure in aid of systemic and structural change, illustrate how the two projects can pull in different directions. The value of this illustration flows not from the similarity of the US system to that of Great Britain – they are very different – but from the similar trajectories, over time, of their social change models. Both have moved roughly from a model depending almost exclusively on individual claims to apply pressure for change, to one that focuses more on the strategic sending of deterrent messages.¹⁸ This section will therefore first explain the relevance of the US experience to a reform debate shaped increasingly by EC law and policy, and then outline the causes and consequences of the evolving conflict between the two projects in the US.

3.1. *Why Consider the US?*

There are two obvious objections to looking to the US for insight into issues raised by a single equality act for Great Britain. The first is that the British problem exists within a European context of regulation under EC Article 13, the directives already and soon to be issued under its authority, and the case law of the European Court of Justice (ECJ). This means that the debate over the appropriate approach to promoting equality cannot proceed exclusively on a UK level, which limits the value of a US-GB comparison. The second objection is that the existing institutional

¹⁸ See A. Baker, 'Effective Deterrence v Accessible Remedies: What *Not* to Borrow from US Discrimination Law', *IJD & L*, Vol. 6, 2004, p. 109, and Section 4 *infra*.

and substantive arrangements in the US and GB differ too much for US developments to yield any useful lessons. The first objection cannot be explained away, but must be accepted, and the limitations that flow from it understood and used to modify any suggestions provoked by the US illustration. The second objection, on the other hand, simply overstates the case.

Although EC law and policy must perforce have a far-reaching influence on the objectives and substance of a single equality act, for Great Britain or for any EU Member State, it cannot and should not dictate the precise arrangements for delivery of either individual rights vindication or policy implementation. It can and does prescribe certain minimum standards for remedies in individual cases,¹⁹ and it has required and will require the imposition of duties, the creation or empowerment of enforcement bodies, and the adoption of specific approaches to proof of discrimination.²⁰ However, the Member States generally enjoy broad discretion in choosing their means of implementing the law flowing from Article 13, and have adopted a wide variety of different arrangements for dispute resolution and anti-discrimination enforcement.²¹ Of course, beyond the legal constraints of EU membership there is the fact that the anti-discrimination discourse increasingly takes place at a European level, not just at member state level. The adoption of Article 13 has given rise, over the last several years, to a rich literature dealing with questions such as what Europe means by 'equality', how to implement the EC policy against discrimination, and how to assure effective remedies for violation of EC rights.²² Nevertheless, no matter how many questions about the substance and procedure of equality regulation are settled at a European level, there will remain important questions, especially procedurally and institutionally, that Great Britain must resolve for itself. In

19 See, e.g. *Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall II)*, [1993] ECR I-3313.

20 See, e.g. Council Directive No. 2000/43 on the implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (O.J. 2000, L180/22).

21 See, e.g. C. Kilpatrick, 'Emancipation through Law or Emasculation of Law? The Nation-State, the EU, and Gender Equality at Work' in J. Conaghan, R. Fischl, and K. Klare (eds.) *Labour Law in an Era of Globalization*, Oxford, OUP, 2002, pp. 489, 505-509; K. Berthou, 'New Hopes for French Anti-Discrimination Law', *IJCLIR*, Vol. 19, 2003, pp. 109-137; T. Havinga, 'The effects and limits of anti-discrimination law in The Netherlands', *IJ Soc. of Law*, Vol. 30, 2002, pp. 75-90.

22 C. McCrudden, 'The New Concept of Equality', a paper for the Academy of European Law Conference: *Fight Against Discrimination: The Race and Framework Employment Directives*, Trier, 2-3 June 2003; S. S. Fredman, 'Equality: A New Generation?' *ILJ*, Vol. 30, 2001, pp. 145, 163-167 ('Generation'); C. Barnard & Hepple, n. 4 *supra*; M. Bell, n. 8 *supra*.

light of the fact that in many respects Britain's legal system resembles that of the US far more than those of its civil law European neighbours, study of the US can still shed useful light on many issues. Those issues include, among others, the following subjects of this article: (1) the institutional arrangements that GB will make for the vindication of individual equality rights (GB or EC) and (2) the approach GB will take to enforcing equality policy (within the loose parameters set by EC law).

Some characteristics of the US system, however, might appear to make its experience unhelpful as a predictor of similar problems in the UK. For example, the single equality body in the US, the Equal Employment Opportunity Commission (EEOC), has exclusive, original jurisdiction of all federal employment discrimination claims, and US discrimination lawsuits call for resolution by jury trial in the US federal courts, which resemble the UK High Court more than British employment tribunals. These differences do not, however, make US developments irrelevant to Britain. Even without the delay represented by a mandatory EEOC stage, US discrimination lawsuits take at least 18 months from filing to conclusion – three times the usual duration of a UK tribunal claim.²³ Nothing inherent in the tribunals prevents delays from lengthening to US dimensions if formality and stakes continue to increase: UK equal pay cases already experience US-style delays because of the stakes involved (see section 4.4 *infra*). Also, even without exclusive jurisdiction, the British equality commissions participate in a greater proportion of discrimination claims in the tribunals than does the EEOC in the federal courts (see section 4.3 *infra*). The differences between the US federal courts and the GB tribunals owe more to what has been expected of them than to any immutable characteristics. The point in looking at the US is that Britain – and indeed Europe – has begun to expect from the tribunals and commissions what the US has long expected from the EEOC-federal court system. What follows seeks to explain how those expectations affected the remedial arrangements in the US, in order to illuminate the possible impacts of similar expectations in Britain.

3.2. *The US Story*

Title VII of the Civil Rights Act of 1964 formed the bedrock of US employment discrimination law, prohibiting workplace discrimination on

23 A. Baker, n. 18 *supra*; J. MacMillan, 'Employment Tribunals: Philosophies and Practicalities', *ILJ*, Vol. 28, 2000, pp. 33, 45-46.

the grounds of race, gender, and religion.²⁴ The original mechanism for enforcement of those prohibitions was the individual claim for compensation, brought by aggrieved employees to the EEOC in the first instance.²⁵ Dispute resolution project voices at the time called for the EEOC to have adjudicative powers, to resolve disputes quickly and cheaply, but this was the first of several policy decisions that advanced social change at the expense of dispute resolution.²⁶ The EEOC received exclusive jurisdiction over all employment discrimination claims, and its job was to investigate, where appropriate accuse, and seek conciliation of claims or, failing that, give claimants permission to pursue a private lawsuit in the US Federal District Courts.²⁷ The creators of this system thought that the EEOC would conciliate most claims, and that lawsuits in the federal courts would be a last resort.²⁸

Not long after the enactment of Title VII it became clear that the system imposed little meaningful pressure on employers, and that the EEOC, strapped by limited funding, could not hope to conciliate more than a fraction of the claims it received. To deal with the problem, the EEOC received the power to take on claims in its own name, meaning that if a claim appeared to have strategic importance in the fight against discrimination, the EEOC could take the place of the claimant, and pursue the lawsuit in the federal courts seeking injunctive and monetary relief extending far beyond compensation to the original claimant.²⁹ The EEOC adopted a policy of not really trying to conciliate even most of the claims brought before it, focusing instead on the strongest claims, from which it could select those it would prosecute in its own name.³⁰ This led to a state of affairs where most employment discrimination claimants received nothing from the EEOC but a six-month delay and the right to file a federal lawsuit, while the EEOC scored high-profile victories against large corporations yielding damages counted in the millions of dollars.³¹

24 42 USC s 2000e-5 ff; 42 USC s 1981; age and disability discrimination were prohibited in 1967 and 1991 respectively (29 USC s 621 ff; 42 USC s 12101 ff).

25 42 USC s 2000e-5(e).

26 2 [1964] US Cong & Adm News, pp. 2515-16.

27 See *An Evaluation of the EEOC Mediation Program*, Washington, EEOC, 1999, <<http://www.eeoc.gov/mediate/report/chapter4.html> (*EEOC Mediation*)>.

28 See *EEOC Mediation*, n. 27 *supra*; 2 [1964] US Cong & Adm News, pp. 2404, 2515-16.

29 The Equal Opportunities Act of 1972.

30 *EEOC Mediation*, n. 27 *supra*.

31 *EEOC History: 35th Anniversary: 1965-2000*, Washington, EEOC, 2000, <<http://www.eeoc.gov/abouteeoc/35th/index.html>>; M. Green, 'Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims', *Rutgers LJ*, Vol. 31, 2000, p. 457.

The social change project won another policy victory in 1991. The Civil Rights Act of 1991 introduced the right to a jury trial in employment discrimination cases, and the potential for punitive damages to be awarded by juries, according to standards much less restrictive than those prevailing in the UK for exemplary damages.³² It may not be immediately clear how this harmed the dispute resolution project beyond having the EEOC's attention turned away from garden variety individual claims. Surely, one might think, higher damages and more generous granters thereof must have helped the individual plaintiff. However, punitive damages and profligate juries would not help individual plaintiffs who could not afford to bring a case to judgment, and the higher stakes they represented excluded even more claimants than before from a formal hearing.

This exclusion occurred because higher stakes meant more and better lawyers, more legalism, more procedural manoeuvring, more work for the courts and the EEOC, and more time and expense for claimants and their lawyers.³³ Attractive remedies brought more claims to the EEOC, which could thus give its attention to an even smaller percentage of claims than before. Because all claims carried the potential for catastrophic damages, defendants involved their lawyers much more at early stages, such as EEOC investigation or conciliation, leading to more work and delay. Once cases came to court, corporate counsel used every procedural mechanism available to delay and thwart the plaintiff's or the EEOC's case – any amount of legal expense can be justified when punitive damages lurk in the background. The bigger the award the greater the publicity, causing the courts to proceed with greater caution, making certain not to deprive the defendant – at risk, potentially, of bankruptcy and shame – of appropriate procedural safeguards. All of these developments served the social change project quite well: the legal talent invested, the care exercised by the institutions, and the natural selection of strong cases tended to result in the sending of clear, forceful, and considered messages. From a dispute resolution perspective, though, it all made the game too expensive and drawn out for most claimants to participate.

Predictably, the changes of 1991 accelerated the exclusion of most employment discrimination victims from any formal avenue of relief. By the end of the 1990s, the EEOC only investigated a small minority of

32 *Kuddus (AP) v. Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; 42 USC s 1981a(b)(1).

33 See 2 [1991] US Cong & Adm News, p. 655-6; Baker, n. 18 *supra*.

claims, and the rest were contracted out to mediation or ignored.³⁴ By 2000, over 97 per cent of claimants left the EEOC process with nothing more than a letter authorising them to bring a federal lawsuit; little more than two per cent of these claimants ever got to trial.³⁵ This number consists almost exclusively of those able to attract legal representation on the basis of their relatively high pay.³⁶ Thus, only a tiny minority of discrimination victims in the US – usually management level employees – get to try their chances with a judge or jury.

3.3. *The Role of ADR in the US*

The practical unavailability of a formal judicial remedy to nearly all individual victims of employment discrimination in the US has caused an exodus to private dispute resolution. Alternative Dispute Resolution (ADR) methods have become the preferred means of dealing with employment discrimination claims in the US. Mediation, always available privately, is offered by the EEOC to around half of all claimants, and every district of the US federal courts has a mandatory ADR service for discrimination claims, usually involving mediation.³⁷ Although any appropriately flexible dispute resolution system should employ mediation or some variant, like ACAS conciliation, as one of several options, mediation in the US occurs against a backdrop of no meaningful judicial alternative for most employees. It is used not only by those who prefer a quick, negotiated settlement and, perhaps, a renewal of cordial relations with their employer, but by those who would prefer an objective finding of wrongdoing and a legally deserved – not negotiated on the basis of likely litigation costs, chances of success, and bargaining strengths of the parties – award of compensation. For most victims mediation represents the only chance of any result of any kind.

34 *EEOC Mediation*, n. 27 *supra*.

35 *Statistics for All Statutes FY 1992-FY2000*, Washington, EEOC, 2001, <<http://www.eeoc.gov/stats/all.html>>; *EEOC Litigation Statistics, FY 1992 through FY 1999*, Washington, EEOC, 2001, <http://www.eeoc.gov/stats/litigation.html>; L. Maltby, 'Private Justice: Employment Arbitration and Civil Rights', *Columbia HRLR*, Vol. 30, 1998, pp. 43, 47, 60; S. Burbank and L. Silberman, 'Civil Procedure Reform in Comparative Context: the United States of America', *AJCL*, Vol. 45, 1997, p. 675.

36 A. Baker, n. 18 *supra*; Maltby, n. 35 *supra*, pp. 47, 57; W. Howard, 'Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?' *Disp Res J*, Oct.-Dec. 1995, p. 40, 40-49; E. Hill, 'AAA Employment Arbitration: A Fair Forum at Low Cost', *Disp Res J*, 2003, p. 10.

37 *EEOC Mediation*, n. 27 *supra*.

An exception to this rule exists for signatories of pre-dispute mandatory arbitration agreements (arbitration agreements).³⁸ Those who sign arbitration agreements generally do so as a prerequisite to employment, agreeing thereby to submit any dispute with their employer, including discrimination, to binding, final arbitration.³⁹ Employers – an important driving force in the US dispute resolution project – use these agreements to keep down litigation costs, and the courts enforce them.⁴⁰ Their popularity keeps growing, and a good estimate has almost a third of private-sector employees bound by an arbitration agreement.⁴¹ Thus, claimants turn to mediation as an alternative to nothing, and to arbitration because their jobs depend on it. The US appetite for ADR bears a much greater resemblance to starvation than to the gourmand's choice of delicacies from a buffet.

Owing to the US dependence on ADR, it emerges as one of the flash-points in the conflict between the two projects in the US: both sides talk about ADR, but they have different ideas about its best form and function. The dispute resolution project tends to see arbitration agreements as the only way a working-class claimant can get a hearing and a decision on his or her claim.⁴² Social change project adherents tend to oppose the use of mandatory arbitration because it limits the deterrent pressure that the EEOC and private attorneys general can bring to bear through dramatic court successes.⁴³ If fully enforced, arbitration agreements assure that roughly a third of private-sector employees will not (a) become 'private attorneys general' or (b) bring claims to the EEOC to choose which ones to champion for its strategic ends. The SCP prefers non-binding mediation, a process where the claimant always has (theoretical) recourse to the EEOC or court.

38 'Pre-dispute' distinguishes these agreements from those, always theoretically available, that parties may enter into after a particular dispute has arisen, for the purposes of dealing with that dispute alone. Such agreements are rarely viewed as advantageous by both parties to a dispute after the fact, so play little role in resolving employment discrimination claims in the US. 'Access v. Process', n. 15 *supra*, pp. 121-123.

39 M. Green, n. 31 *supra*, pp. 400-421.

40 L. Maltby, n. 35 *supra*, p. 31; *Gilmer v Interstate/Johnston Lane* (1991) 500 US 20; *Circuit City Stores, Inc. v Adams*, (2001) 121 S.Ct. 1302.

41 A. Baker, n. 18 *supra*.

42 W. Howard, n. 36 *supra*; S. Fitzgibbon, 'After *Gardner Denver*, *Gilmer*, and *Wright*: The Supreme Court's Next Arbitration Decision', *St. Louis ULJ*, Vol. 44, 2000, p. 833.

43 S. Hoffman, 'Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?' *Berkeley JELL*, Vol. 17, 1996, p. 149; J. Sternlight, 'Is the US Out on a Limb? Comparing the US Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World', *U Miami LR*, Vol. 56, 2002, p. 839; D. Sherwyn, J. Tracey and Z. Eigen, 'In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process', *U Penn JLEL*, Vol. 2, 1999, pp. 76, 137-138.

Depicting the full texture and nuance of the US arbitration debate exceeds the aims of this article, but the significance of it here flows from the direct opposition of the two projects over this issue. Civil rights advocates, academics, and policymakers who see themselves as fighting discrimination by supporting the availability of a cheap, quick, accessible forum in arbitration (as well as employers, who see themselves as trying to save money) array themselves against other civil rights advocates, academics, and policymakers who see themselves as fighting discrimination by maximising the opportunities for deterrent message sending.⁴⁴ The two sides do not oppose each other's objectives, but oppose the mutually exclusive means of attaining them. The EEOC, in condemning arbitration agreements for depriving the courts of an opportunity to clarify the public policy on discrimination, does not actually begrudge the \$25,000-a-year worker the relatively cheap and accessible forum of arbitration, which is the only avenue of rights vindication realistically on offer. Yet its argument would have that effect, given that the only way that worker will get an opportunity to arbitrate is through signing an enforceable pre-dispute agreement. It is because the dispute resolution system is viewed as the single, integrated mechanism for meeting the ends of both projects that the two projects must fight over its use.

The dire situation of the typical US discrimination victim, and the conflict between the two projects on arbitration and other issues, both owe their existence to the following historical facts. The original model for social change granted (or recognised) a right not to be discriminated against. It used the vindication of that right as the means of applying pressure for change, until it was believed that this approach applied insufficient pressure. Then it was decided to use the process designed for the vindication of individual rights to do far more than vindicate individual rights. As soon as the social change project began using the dispute resolution system for more than mere dispute resolution, a conflict emerged, and the circumstances described in the preceding paragraphs developed. All of these facts have happened or might happen in Britain, as will be discussed below. The

44 In favour of arbitration agreements: Maltby, n. 35 *supra*; S. Estreicher, 'Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements', *Ohio St JDR*, Vol. 16, 2001, p. 559; M. Swendiman, 'The EEOC Mediation Program: Panacea or Panicked Reaction?', *Ohio St JDR*, Vol. 16, 2001, p. 392. Against arbitration agreements: S. Herr, 'Reforming Disability Nondiscrimination Laws: A Comparative Perspective', *U Mich JLR*, Vol. 35, 2001-2002, pp. 305, 368; K. Stone, 'Mandatory Arbitration of Individual Employee Rights Cases: the Yellow Dog Contract of the 1990s', *Denver LR*, Vol. 73, 1996, p. 1017; EEOC Notice No 915002: 'Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment', Washington, EEOC, July 10, 1997.

point of tracing parallels between the US and GB experiences is not to support a prediction that Britain will inevitably follow the same path as the US. Instead, the comparison seeks to demonstrate that Great Britain has good reasons to pay more attention to the emerging tension between the two projects, and that it is by no means too late to do so.

4. THE EVOLUTION OF THE TWO PROJECTS IN GREAT BRITAIN

When the UK government first announced its plans to improve on the existing work of three anti-discrimination agencies, the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC), and the Disability Rights Commission (DRC), by forming the new CEHR, its stated aim was to ‘tackle barriers to participation and change culture’,⁴⁵ through the use of ‘a strategic, modern approach to enforcement of equality legislation, supported by up to date enforcement tools’.⁴⁶ The move to ‘modern’, ‘up to date’ approaches follows an historic trend away from enforcing anti-discrimination law exclusively through individual claims. Tracing that trend, the following sections analyse, in turn, the original blueprint for employment discrimination regulation in Britain, the role of the tribunals, the role of the equality commissions, the effect of rising stakes in discrimination cases, and the emergence of a British dispute resolution movement.

4.1. *The Early Social Change Model*

The first British anti-discrimination model focused almost exclusively on dispute resolution.⁴⁷ The Race Relations Act 1965 created the Race Relations Board (RRB), which had responsibility for resolving complaints of race discrimination. This first UK effort at regulating discrimination consciously avoided relying on courts or even employment tribunals, and the RRB itself, through its local conciliation committees, adjudicated all claims. The Race Relations Act 1968 sought to strengthen the RRB’s enforcement role through court enforcement of RRB orders,

45 *Equality and Diversity: Making it Happen*, London, DTI, 2002, Part 2, para. 1, <http://www.womenandequalityunit.gov.uk/equality/project/making_it_happen/cons_doc.htm> (*Making it Happen*).

46 T. Sifrin, *Guardian Unlimited*, October 30, 2003, <<http://society.guardian.co.uk/raceequality/story/0,8150,1074094,00.html>> (quoting Patricia Hewitt, Secretary for Trade and Industry and Minister for Women).

47 H. Collins, *Employment Law*, Oxford, OUP, 2003, p. 73; C. McCrudden *et al.*, n. 8 *supra*, pp. 8-12.

but the focus remained exclusively on providing 'for the peaceful and orderly adjustment of grievances and the release of tensions'.⁴⁸

The Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA) wrought extensive reform of this model. Parliament had behind it a decade of pure dispute resolution to demonstrate that resolving disputes alone does not change the underlying structures of discrimination. During consultation on the SDA, it became clear that having enforcement activity depend on individual complaints deprived that activity of any strategic coherence, flowing as it did from essentially random individual decisions to act.⁴⁹ The White Paper preceding the passage of the RRA explained, 'although it is necessary for the law to provide effective remedies for the individual victim it is also essential that the application of the law should not depend on the making of an individual complaint.'⁵⁰ This concern led to the SDA and RRA keeping agency enforcement separate from individual claims.⁵¹

The government wanted to strengthen the impact of the legislation on the conduct of the regulated, and the EOC and CRE emerged in response to this concern, as an intentional choice not to pursue the US 'private attorney general' approach.⁵² The SDA and RRA actually gave institutional recognition to the separateness of individual justice and social change objectives. They gave resolution of employment disputes to the industrial (now employment) tribunals – no agencies need be involved. The EOC and the CRE would have two separate responsibilities: to help with individual claims and to pursue an enforcement strategy to bring about change.⁵³ Thus, Britain did not set out to pursue the social change project exclusively through a dispute resolution model.

4.2. *The Tribunals as Quintessential Dispute Resolution Forums*

The SDA and RRA did not initially cast the employment tribunals in the rôle of forums for social change. Indeed, one could hardly look at the tribunals of the 1970s and think, 'this is where equality will become a reality.' Until the 1971 advent of the action for unfair dismissal, the tribunals handled a small range of matters such as entitlement to assessments from

48 C. McCrudden *et al.*, n. 8 *supra*, p. 269.

49 G. Applebey and E. Ellis, 'Formal Investigations: the Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies', *PL*, 1984, pp. 236, 238.

50 *Racial Discrimination Report Cm 6234*, 1975, para. 36.

51 Applebey & Ellis, n. 49 *supra*, pp. 238-239.

52 *Ibid.*, pp. 20-22.

53 C. McCrudden *et al.*, n. 8 *supra*, pp. 270-275; Applebey & Ellis, n. 49 *supra*, p. 277.

the Industrial Training Act 1964, or payments under the Redundancy Payments Act 1965.⁵⁴ The tribunals consisted of a 'chairman' – legally trained, and more specifically trained to handle employment matters – and two lay members with some industrial experience, one chosen from a pool vetted by employers, the other from a pool vetted by labour representatives.⁵⁵ This arrangement sought to give effect, going forward, to a long tradition in the UK of voluntary labour-management dispute resolution.⁵⁶ Disputes were to be resolved on the basis of industrial justice, not complex legal rules, and the goal was the peaceful adjustment of grievances and maintenance of an ongoing productive relationship.⁵⁷ It has been said that the sole purpose of labour tribunals the world over is to answer the question, 'can they do that to me?'⁵⁸ The industrial tribunals of the mid-1970s were certainly no exception.

The decision to give individual discrimination claims to the tribunals drew in part from the 'Donovan Report', which hailed the tribunals, as it saw them in 1968, as 'easily accessible, informal, speedy, and inexpensive.'⁵⁹ In those days, it was not obvious that anything significant distinguished the task of deciding whether a dismissal was based on race from the task of deciding whether the same dismissal was procedurally unfair, or whether a redundancy payment should issue. According to one tribunal chairman,

Donovan [of the Report] cannot possibly have contemplated that a chairman sitting alone should be called upon to disapply provisions of UK law, having first determined the interaction between UK and European substantive law, procedural and jurisdictional time limits in a handful of test cases representing some 40,000 applicants with claims said to be worth in excess of £100m with 11 counsel, including three silks, addressing him on pure questions of law, over five days.⁶⁰

54 J. MacMillan, n. 23 *supra*, pp. 34-40; B. Doyle, *Employment Tribunals*, Bristol, Jordans, 1998, para. 1.1.1-3.

55 B. Doyle, n. 54 *supra*, para. 3.3.1. The statute employs the term 'chairmen', but I will use the gender-neutral 'chairs' hereafter.

56 H. Brown and A. Marriot, *ADR Principles and Practice*, London, Sweet & Maxwell, 1999, para. 11-008-11-014.

57 C. McCrudden *et al.*, n. 8 *supra*, p. 273; J. MacMillan, n. 23 *supra*, p. 35; S. Fredman, n. 4 *supra*, p. 167; B. Hepple Report, n. 5 *supra*, para. 1.52.

58 B. Brooks, 'Some Recent International Developments in Employment Dispute Settlement', *IJCLIR*, Vol. 17, 2001, pp. 199, 199.

59 *Report of the Royal Commission on Trade Unions and Employers' Associations 1965-1968*, Report Cm 3623, 1968.

60 J. MacMillan, n. 23 *supra*, p. 43.

It is almost certain that Parliament did not, in sending employment discrimination claims to the tribunals, expect anything of the kind either.

Early on, discrimination claims constituted a small fraction of the tribunal caseload, and tended to involve moderate awards to often unrepresented claimants.⁶¹ The stakes were not high enough to justify too much expensive legal representation, and the EOC and CRE only infrequently appeared to push the social change project. The social change efforts of the commissions were intended, in the beginning, to focus primarily on formal investigations of discriminatory practices.

4.3. *The Commissions Take Policy Implementation into the Tribunals*

As it turned out, agency pusillanimity and evisceration of the formal investigation power by the courts left the commissions with strategic litigation as their strongest weapon for social change. Formal investigations should have applied effective law enforcement pressure through what are called 'named' or 'belief' investigations.⁶² Through this mechanism a commission can investigate named individuals (e.g. companies, public authorities) if it has a belief that they have committed an unlawful act.⁶³ The SDA and RRA intended that the EOC and CRE prosecute their strategic law enforcement aims through these investigations and resultant 'non-discrimination notices',⁶⁴ but the courts and investigation respondents did not cooperate.

The two commissions had different experiences, but the outcomes for each were much the same. The CRE, in the first two years of its existence, leapt out of the gate with 47 formal investigations, 24 of which involved employment. By 1984 only 14 had been concluded; from 1985-1992 only four investigations into employment discrimination were completed; by 1998 only a single additional employment discrimination investigation came to a close.⁶⁵ The EOC, meanwhile, never showed a real commitment to use its investigation powers, and by 1990 had issued

60 J. MacMillan, n. 23 *supra*, p. 43.

61 C. McCrudden *et al.*, n. 8 *supra*, p. 37, 159, 176; Leonard, n. 8 *supra*, pp. 150-154.

62 Applebey & Ellis, n. 49 *supra*, p. 240; McCrudden *et al.*, n. 8 *supra*, pp. 25-26.

63 SDA 1975 s. 57-58; RRA 1976 s. 48-49; Disability Rights Commission Act 1999. The new CEHR is to have roughly the same authority. CEHR White Paper, n. 1 *supra*, p. 44.

64 Promotion was also part of the commissions' social change powers, but has not proven sufficiently effective in applying pressure on employers and public authorities. See, e.g. *Seriously*, n. 4 *supra*, pp. 7-8.

65 J. Clarke and S. Speeden, *Then and Now: Change for the Better?* London, CRE, 2001, p. 25.

only four non-discrimination notices.⁶⁶ Although space forbids a proper discussion of why this happened, the simple version is that (a) the targets of the investigations responded with every legal challenge imaginable, and (b) a series of decisions in the early 1980s, by courts uncomfortable with this new law enforcement tool, 'virtually eradicated the investigative powers of the commissions.'⁶⁷ Companies and institutions take up a very defensive and lawyer-rich stance when on the receiving end of law enforcement activities by government agencies. The targets of formal investigations in the late 1970s and early 1980s proved no exception, and they found sympathetic listeners in the House of Lords.⁶⁸ Successful challenges rendered the investigation process so complex, costly and slow that formal investigations are hardly used by any commission today, and strategic efforts have turned to other outlets.

With their formal investigation power thus hobbled, the commissions could be forgiven for turning to strategic litigation. This transpired, more or less, with the EOC,⁶⁹ but the CRE has increased its emphasis on strategic litigation only in the last decade, after a long period of attempting to assist all meritorious cases that could not proceed without its help.⁷⁰ In the early 1980s the Commission gave representation to roughly a fifth of those who applied for support at the tribunals.⁷¹ By 1998 that proportion had been cut in half.⁷² The EOC finds itself in roughly the same position as the CRE, although it never really digressed into playing a strong dispute resolution role. The EOC has consistently focused on promotion and taking strategic test cases, and has had some success with this approach.⁷³ It does support individual cases at tribunals, but has consistently supported a smaller percentage of applicants than has the CRE.⁷⁴ Nevertheless, the CRE, the EOC and the more recently created DRC have had an important impact in the tribunals. The presence of the commissions has created a two-tiered claim system, in that those who receive agency assistance or

66 L. Dickens, n. 8 *supra*, p. 118.

67 McColgan, n. 4 *supra*, p. 125.

68 *Hillingdon London Borough Council v CRE* [1982] AC 779; *R v CRE ex parte Prestige Group plc* [1984] ICR 472.

69 A. Leonard, n. 8 *supra*, p. 2; Dickens, n. 8 *supra*, p. 118.

70 J. Clarke & S. Speeden, n. 65 *supra*.

71 *Ibid.*, p. 28.

72 A. McColgan, n. 4 *supra*, pp. 125-126.

73 N. Lipper, 'Sexual Harassment in the Workplace: a Comparative Study of Great Britain and the United States', *CLLJ*, Vol. 13, 1992, p. 293.

74 Leonard, n. 8 *supra*, p. 22. While the CRE averaged roughly 120 tribunal representations a year in the early 1980s, the EOC provided representation at 12 tribunals in 1980, 14 in 1981, and 15 in 1982.

representation fare better than those who do not.⁷⁵ Applicants represented by a commission win almost twice as often as other applicants, including those with legal representation, who win almost twice as often as those without.⁷⁶

It is important to note in this regard that despite agencies in Britain taking cases 'selectively', they have a greater presence in the tribunals than the EEOC has in the US federal courts. Although over 20 per cent of UK employment discrimination claims get to a hearing as compared to roughly two or three per cent in the US, the British commissions feature in a larger percentage (14 per cent versus 12.5 per cent in the US) of that less exclusive group of cases.⁷⁷ This extensive law enforcement commitment in the tribunals may reap strategic dividends but leaves 86 per cent of claimants to settle for a second-class version of the process afforded more 'strategic' victims. It will take much more than these pages can accomplish to prove that EOC and CRE strategic litigation has increased the time and expense of bringing a discrimination claim to a tribunal hearing. However, the point has not been to prove that proposition, but to suggest that agency strategic litigation has become an increasingly prevalent feature in the tribunals at the same time as the tribunals have become more formal and therefore less accessible without legal representation. Agency involvement in the tribunals is of course only one way in which the stakes in tribunal claims have risen in the last decade.

4.4. *Rising Stakes in the Tribunals*

A number of factors can produce heightened stakes in employment discrimination litigation. Having a government agency prosecuting claims certainly has that effect. Higher damages also raise stakes, as does raising the profile of a case, or multiplying the number of claimants involved. Raised stakes make defendants spend money to defend their position, and thus increase the time and expense of participating in a dispute resolution process.⁷⁸ The most striking example of this in Britain, where class action suits in the US sense do not exist in the employment sphere, is equal pay cases.

75 C. McCrudden *et al.*, n. 8 *supra*, pp. 222-223; J. Clarke & S. Speeden, n. 65 *supra*, p. 35; Leonard, n. 8 *supra*, pp. 125-127.

76 A. Leonard, n. 8 *supra*, pp. 125-127; C. McCrudden *et al.*, n. 8 *supra*, p. 178.

77 ACAS *Annual Report 2002/2003*, London, ACAS, 2003, p. 42 (ACAS 2002/2003); CEHR white paper, n. 1 *supra*, p. 41, fn. 15; Baker, n. 18 *supra*.

78 *Commission for Racial Equality Annual Report 1998*, London, CRE, 1998, pp. 23-26, <<http://www.cre.gov.uk/pdfs/ar98.pdf>> (CRE 1998).

British protection against unequal pay for work of equal value (like 'comparable worth' in the US) involves complicated factual disputes as to the relative value of particular jobs, and can involve, or at least potentially affect, whole sections of a company's workforce.⁷⁹ Employer respondents in such cases can have a great deal to lose, in that a decision against them can require an increase in pay across a band of employees. Respondents therefore have a strong incentive to apply expensive legal muscle to wrangle over the highly technical questions upon which these cases can turn. As a result, in 2000 for example, the average time for completion of an equal value case in the UK was almost 20 months.⁸⁰ According to the Employment Appeals Tribunal, such delay is 'properly described as scandalous and amount[s] to a denial of justice to women through the judicial process.'⁸¹ The delay occasioned by these complaints offers an excellent illustration of what happens when employers face something close to a class action lawsuit, with multiple plaintiffs, a high profile, a large potential downside, and plenty of room for technical or legal manoeuvre. It also demonstrates that despite obvious institutional differences between the tribunals and US federal courts, the wrong inputs to an employment tribunal can produce an output – in terms of delay and expense – that closely resembles what the US courts have to offer. Here, the 'wrong' input is the class action-like scale of the litigation, but high damages in general have had an impact across the full spectrum of UK discrimination cases.

In the early 1990s the RRA and SDA schemes came under heavy criticism for a variety of failings, among them the lack of a serious deterrent to discriminatory conduct. In addition to the failure of formal investigations to amount to a real threat, both statutes had caps limiting the amount of damages available to the victims of employment discrimination. One commentator called the 1990 limit, of around £11,000, 'derisory', and bemoaned the system's preference for 'backward-looking compensation' over 'forward-looking deterrent awards.'⁸² Others condemned not only the statutory limits, but their superfluity: the vast majority of awards came in well under the caps as long as the caps existed. It appears that from the advent of the SDA and the RRA to the 1990s, there persisted a judicial culture in the tribunals of awarding modest awards: from 1988 to 1989, 76 per cent of awards did not exceed £1,500 and only two

79 B. Hepple Report, n. 5 *supra*, para. 4.27; *Towards Equal Pay: Consultation on Proposals to Strengthen Equal Value Procedures*, London, DTI, 2004, pp. 6-7 (*Equal Pay*).

80 *Equal Pay*, n. 79 *supra*, p. 6.

81 *Aldridge v British Telecommunications, plc* [1990] *IRLR* 10, 14.

82 L. Dickens, n. 8 *supra*, pp. 116, 120-122.

claimants received over £8,000; from 1989 to 1990, 62 per cent of awards fell short of £1,500, and only one person received more than £8,000.⁸³ Such moderation in no way conflicted with the aims expressed in the White Papers on the SDA and RRA – individual compensation was never intended as a significant source of pressure for change. However, reformers who had given up on the defunct formal investigation began to see enhanced *in terrorem* awards of compensation as the way forward for social change.⁸⁴

During the 1990s, the reformers began to get what they wanted. Pursuant to an ECJ decision, the government removed the caps from SDA cases in 1993 and from RRA cases in 1994.⁸⁵ Average awards of compensation, unsurprisingly, climbed markedly thereafter. By 2000, the average award for disability discrimination was around £13,000, for race around £13,700, and for sex around £9,500.⁸⁶ Tribunal awards began rising to some extent immediately in 1994, and the commissions did what they could to help loosen up even further a tribunal judiciary whose meanness reflected its industrial justice roots, not the policy implementation role increasingly thrust upon it.⁸⁷

As damages – and hence stakes – went up, lawyers became commonplace in the tribunals, and the duration and complexity of proceedings increased. Although some commentators decried excessive juridification of tribunals before damages caps were lifted,⁸⁸ it was only after damages began to rise that complaints regarding excessive delay and legalism led, by 1997, to proposals for reform of tribunal procedure – most notably in the Employment Rights (Dispute Resolution) Act 1998 (the 1998 Act).⁸⁹ Although the correlation is admittedly anecdotal, the delay and formality coincident with enhanced agency law enforcement

⁸³ *Ibid.*, p. 117.

⁸⁴ P. Ghandhi and P. Schofield, 'Damages for Employment Discrimination', *NLJ*, Vol. 140, 1990, p. 52; C. McCrudden, n. 8 *supra*, pp. 278-282; Dickens, n. 8 *supra*, p. 117, 119, 121-122.

⁸⁵ Sex Discrimination and Equal Pay (Remedies) Regulations 1993 SI 1993/2798; Race Relations (Remedies) Act 1994; *Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall II)*, [1993] ECR I-3313. The ECJ ruled that damages caps in employment discrimination cases violated European Community equal treatment law. Significantly, part of the ECJ's rationale was that awards in equality cases must have a real deterrent effect on employers.

⁸⁶ A. McColgan, n. 4 *supra*, p. 130.

⁸⁷ *CRE 1998*, n. 78 *supra*, pp. 23-26.

⁸⁸ See, e.g. R. Lewis and J. Clark, *Employment Rights, Industrial Tribunals and Arbitration: the case for Alternative Dispute Resolution*, London, IER, 1993.

⁸⁹ L. Dickens, M. Jones, B. Weekes, and M. Hart, *Dismissed*, Oxford, Blackwell, 1985, pp. 194-200; R. Hunter and A. Leonard, 'Sex Discrimination and Alternative Dispute Resolution: British Proposals in Light of International Experience', *PL*, 1997, p. 298.

activity and heightened damages in the tribunals gave rise to a dispute resolution movement in Britain.

4.5. *The Emerging British Dispute Resolution Movement*

The 1998 Act was the most significant legislative accomplishment of the nascent British dispute resolution movement within employment law. It would be followed by the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2001 and the Employment Act 2002 (the 2002 Act). Unlike the US version, which quickly resorted to private dispute resolution to meet its ends, the UK movement has concentrated on tinkering with the formal system, seeking to 'streamline' the tribunals, or 'encourage' dispute resolution within the workplace. Although the voices of discontent contributing to the movement come from a variety of quarters – lawyers, tribunal chairs, academics, and business⁹⁰ – the government policy agenda appears to have fallen under the influence of employer interests. Initially, the 1998 Act took the balanced approach of making it easier for the tribunals to manage their caseload, by allowing chairs to act without lay members, permitting hearings on documents alone, and facilitating settlement.⁹¹ By the 2001 regulations, however, attention had turned to discouraging 'misconceived' or 'unreasonable' claims, by allowing a tribunal chair, at a 'pre-hearing review', to require a £500 bond from a claimant upon a finding that the case had little chance of success.⁹² This policy of making tribunal claims go away reached its full fruition with the 2002 Act's introduction of controversial mandatory workplace grievance, discipline, and dismissal procedures, making it possible to exclude applicants from the tribunals if they failed to exhaust employer dispute resolution arrangements.⁹³

Just as changing the inputs to the tribunal system in pursuit of the SCP, without considering dispute resolution, can have unwanted effects, so undoubtedly manipulating the dispute resolution mechanisms with an eye only to DRP objectives can limit the effectiveness of those mechanisms for SCP purposes. A particularly egregious example of this phenomenon results from the 2001 tribunal procedure regulations. Their

90 *Routes to Resolution: Government Response to Consultation on Workplace Dispute Resolution*, DTI, November 2001, <<http://www.dti.gov.uk/er/individual/etresponse.pdf>>; CBI Human Resources Directorate, *Managing a Compensation Culture: Improving Case Management in the Employment Tribunal System*, London, CBI, 2000.

91 B. Doyle, n. 54 *supra*, para. 1.3.1-1.3.6.

92 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2001 (SI2001/1171); *Routes*, n. 12 *supra*, para. 5.19.

93 Employment Act 2002, s. 32, Schedule 2.

measures for sifting weak claims make it easier (a) to strike out – or dismiss – a claim at any point in the tribunal process, and (b) to find that a claim has a sufficiently limited chance of success that the claimant must post a bond or be struck out. The raised bond maximum of £500 is quite a significant amount to a person on a £15,000 a year salary, whose weekly pre-tax pay just exceeds £300. The combination of new criteria and a higher bond has had the immediate effect of cutting the proportion of discrimination claims to reach a tribunal hearing by nearly a third.⁹⁴ The number of missing hearings corresponds with a commensurate burgeoning of struck-out claims.

The strike-outs do not appear to have come from among cases that conciliate, or cases that withdraw: those numbers remained consistent.⁹⁵ The regulations have ruthlessly accomplished their aim of thinning out clogged tribunal diaries, which would raise no concerns if the missing hearings represented deadweight, frivolous claims. However, if that were the case, one would expect claimant win rates to increase. Unfortunately, no evidence suggests that this has happened.⁹⁶ The most charitable interpretation is that cases that formerly went to tribunal hearings experienced pressure to settle, and some cases that would otherwise settle were struck out for failure to post a bond, or some similar reason. However, no obvious ground exists to prefer that interpretation over one that has the tribunals now dismissing claims that might otherwise go on to strike a blow for change. It seems unlikely that proponents of measures to streamline tribunal procedures would, wearing social change hats, favour reducing the number of successful deterrent messages sent through the tribunals. However, wearing their dispute resolution hats, they might have accomplished just that. It should surprise nobody if, after the 2002 Act's grievance, discipline, and dismissal procedures have had time to settle in, yet more potential opportunities to send messages and influence conduct get ground down by internal employer procedures, or barred from the tribunals for technical failures to exhaust the statutory procedures.

Whether or not, as a matter of fact, the recent dispute resolution reforms actually undermine the British social change project is again not

94 *ACAS 2002/2003*, n. 77 *supra*, p. 42; *ACAS Annual Report 1999/2000*, London, ACAS, 2000, pp. 53-54.

95 *Ibid.*

96 ACAS reports that from April 2001 to March 2003, discrimination complaints to tribunals based primarily on sex rose by 52 per cent, race by 61 per cent, and disability by 83 per cent. *ACAS 2002/2003*, n. 77 *supra*, p. 42. Meanwhile, from December 2000 to December 2002, the number of discrimination awards from tribunals based on sex rose by only 37 per cent, race by only nine per cent, and disability by only 43 per cent. *EOR*, Vol. 124, December 2003, 124, p. 4.

the primary point. What matters more is the fact that the UK scheme for regulating employment discrimination, like that of the US before it, has fostered a state of opposition between the two projects. It has done this by using the tribunals, clearly designed and suited to dispute resolution, as the central mechanism to apply pressure for social change. The inputs of strategic litigation and the rising stakes of discrimination claims have contributed to a change in the functioning of the tribunals sufficient to provoke a strong reaction from users of the system. This reaction has come in the form of a dispute resolution movement seeking to reduce tribunal expense and delay as a matter of priority. In much the same way that the social change project might introduce robust deterrent mechanisms into the tribunal system without considering the impact of such a move on tribunal accessibility, so the new dispute resolution project does not take account of how its reforms might limit the effectiveness of anti-discrimination legislation. This is the problem of the two projects. The most important step in dealing with it is to acknowledge that it exists.

5. THE TWO PROJECTS AND THE REFORM OF BRITISH EQUALITY LAW

At a time when the currents of debate in equality law seem to flow inexorably toward dramatic reform through a single equality act, scholarship and commentary in Britain have tended to ignore the two projects. The problem often goes beyond mere silence on the subject, as many voices call for measures inimical to accessible individual remedies,⁹⁷ and some even appear keen for Britain to outgrow its dispute resolution phase.⁹⁸ Meanwhile, most of those who do talk about dispute resolution do so as if what is good for individual claims must be good for the cause of equality.⁹⁹ The CEHR White Paper gives no recognition to the two projects, and promises to exacerbate existing tensions. This section will analyse these features of the current discourse, looking first at how some of the

97 *CRE Responses to Consultation on Implementing the Employment and Race Directives*, London, CRE, 2002 (*CRE Response*); C. McCrudden *et al.*, n. 8 *supra*; B. Hepple Report, n. 5 *supra*; A. Leonard, n. 8 *supra*; Fredman, n. 4 *supra*.

98 B. Hepple, 'Equality and Discrimination', in P. Davies, A. Lyon-Caen, S. Sciarra, and S. Simitis (eds.) *European Community Labour Law: Principles and Perspectives*, Oxford, Clarendon Press, 1996; J. Gardner, 'Liberals and Unlawful Discrimination', *OJLS*, Vol. 9, 1989, p. 1; M. Arshi and C O'Conneide, 'Third-Party Interventions: the Public Interest Reaffirmed', *PL*, 2004, p. 69; S. Fredman, n. 4 *supra*.

99 S. Adler, 'The Role of Judges in the Implementation of Social Policies', *IJCLIR*, Vol. 18, 2002, p. 341; C. Harlow, 'Public Law and Popular Justice', *Mod. Law Rev.*, Vol. 65, 2002, p. 1; *Routes*, n. 12 *supra*.

most influential work in the field of UK equality law fails to engage with the two projects. It will then turn to specific proposals for reform, revealing the CEHR White Paper as a missed opportunity, and making suggestions as to how a single equality act could take both projects into account.

5.1. *The Two Projects and Legal Scholarship on Reform in Britain*

The British literature on reform of equality law has missed the real significance of the two projects in at least three distinct ways: (1) failure to recognise that there are two projects and that they might conflict; (2) some recognition that two separate projects exist, but failure to appreciate or deal with the fact that some measures to improve the effectiveness of the social change project might harm the dispute resolution project; and (3) awareness that social change aims can conflict with dispute resolution aims, coupled with a flawed assumption that such conflict is an inevitable part of progress, and that dispute resolution must give way to a new paradigm. This section will discuss these three attitudes in turn.

Several proposals do nothing worse than urge some action in regard to improving the social change impact of the law, without mentioning or appearing to put thought into any effects the measures might have on the accessibility of claims for redress.¹⁰⁰ Aileen McColgan's *Achieving Equality at Work*, for example, seeks to provide an up-to-date account of the 'state of play', in equality law, and to suggest how current problems might be resolved in a new single equality act.¹⁰¹ However, the chapter devoted to 'Enforcement and Remedies' simply does not discuss what effect her preferred 'radical reforms' might have on how claims proceed in the tribunals.¹⁰² She does mention the problems claimants currently experience, and in fairness her proposals do not focus on deterrent litigation, but she gives attention neither to measures calculated to improve individual remedies, nor to whether her proposals will undermine the current arrangements. McColgan's book pursues the social change project with unquestionable rigour, but leaves dispute resolution to its own devices.

100 S. Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', *OJLS*, Vol. 23, 2003, p. 65; 'Powers in Support of the CEHR's Strategic Enforcement Role', CEHR Task Force, 28 January 2004; C. Collins, *Single Equality Body: Issues Paper*, London, Equality and Diversity Forum, October 2002; R. Townshend-Smith, 'Reform of United Kingdom Discrimination Law: Philosophy, Principle or Pragmatism?' *IJD & L*, Vol. 5, 2001, p. 39; McColgan, n. 4 *supra*; CEHR white paper, n. 1 *supra*; C. Barnard & B. Hepple, n. 4 *supra*; L. Dickens, n. 8 *supra*; M. Bell, n. 8 *supra*; C. O'Cinneide, n. 7 *supra*, pp. 19, 74-76.

101 A. McColgan, n. 4 *supra*, p. 2.

102 *Ibid.* pp. 121-134.

A specialised form of the ‘failure to recognise the two projects’ attitude consists of efforts to identify a single, unifying principle that explains what equality law seeks, or should seek, to accomplish. An example of this is Hugh Collins’s thoughtful discussion of social inclusion as a theoretical explanation for the proper aim of equality regulation.¹⁰³ Collins does not mention the impact of such an approach on the accessibility of individual relief. In this he differs little from those who would put, for example, dignity¹⁰⁴ or diversity¹⁰⁵ on the pedestal in place of social inclusion, as fundamental guiding principles. This kind of approach denies the existence of a separate dispute resolution project, just as it denies that the social change project might pursue social inclusion, dignity, and diversity in varying measures.¹⁰⁶ This temptation to see anti-discrimination law as having a single objective might account for much of the failure to consider whether the two projects pull the law in different directions.

Even those commentators who see that anti-discrimination law involves separate dispute resolution and policy implementation objectives appear blind to the systemic relationship between the two.¹⁰⁷ Adherents of this ‘failure to recognise the systemic relationship’ attitude call for high-stakes litigation inputs to the tribunals aiming to produce deterrent outputs, without investigating what dispute resolution outputs those inputs might generate. The Hepple Report provides a good example of this phenomenon. This careful study, which explicitly pursues social change project ends, considers the problems faced by individual victims in seeking redress, and gives some thought to measures that might improve their plight.¹⁰⁸ However, without acknowledging a link, and without recognising any conflict, the report recommends introducing a bristling arsenal of US-style measures for enhancing deterrent pressure and focusing diffuse interests in litigation.¹⁰⁹ These are the very measures that have driven US employment dispute resolution to private providers,

103 H. Collins, n. 7 *supra*.

104 R. Ehrenreich, ‘Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment’, *Georgetown LJ*, Vol. 88, 1999, p. 1; D. Réaume, ‘Discrimination and Dignity’, in C. McCrudden (ed.) *Anti-Discrimination Law (2nd Edition)*, Aldershot, Ashgate Dartmouth, 2004; The Constitution of South Africa, s. 1, 36; *President of the Republic of South Africa v Hugo*, CCT 11/96 18 April 1997, 1997(4) SAI (CC).

105 *Towards Equality and Diversity: Implementing the Employment and Race Directives*, London, DTI, 2001, preface, para. 18.

106 I am indebted to Professor Christopher McCrudden for raising part of this issue at a colloquium on Equality at Oxford Brookes University on 30 April 2004.

107 B. Hepple Report, n. 5 *supra*; C. McCrudden *et al.*, n. 8 *supra*; A. Leonard, n. 8 *supra*; *CRE Response*, n. 97 *supra*.

108 B. Hepple Report, n. 5 *supra*, para. 1.51-1.52, 2.20, 4.34-4.36.

109 *Ibid.* rec. 41, 44.

and could have at least some detrimental effect in Britain. The report not only does not acknowledge this possibility, but makes no reference to having considered the impact of such measures on tribunal efficiency and accessibility at all.

Although failing to recognise the systemic tensions between deterrence and dispute resolution in the tribunals leads to proposals inimical to the dispute resolution project, the most worrying tendency is to view dispute resolution as no more than a discredited, obsolete approach to policy implementation. This third attitude actually recognises a potential inconsistency between accessible individual remedies and robust social change measures, but assumes that one must give way to the other. Sandra Fredman, for instance, criticises the unsuitability of traditional individual tribunal claims to the task of implementing a modern policy agenda.¹¹⁰ She proposes, as a solution to the problem, that equality law leave the old dispute resolution model behind. She favours taking 'the burden of litigation off the individual claimant altogether',¹¹¹ suggesting that 'discrimination law, by its very nature, requires a departure from the traditional adversarial structure, even in the more informal setting of a tribunal.'¹¹² She does not appear to see the part of the dispute resolution project that is an end in itself; for Fredman, individual rights vindication has worn out its usefulness to the social change project, and must yield to a new paradigm.

Many other participants in the debate take some version of the view that where dispute resolution loses its instrumentality in the fight against inequality, it loses much of its *raison d'être*.¹¹³ Of course, reasonable arguments exist for not attributing a high priority to the provision of a cheap, quick, and accessible venue for victims of discrimination to seek relief for their unique injuries. Moreover, none of the commentators cited here actually recommends eliminating individual tribunal claims. It is possible fully to understand the two projects and how they interact, and nevertheless to conclude that if the social change project needs to burden the institution of individual claims in order to make equality a reality, then so be it.¹¹⁴ If that is true, however, the conclusion should be based on investigation, not assumption. Those who seek to leave dispute resolution behind do not demonstrate that to defend accessible individual

¹¹⁰ Fredman, n. 4 *supra*, pp. 163-174.

¹¹¹ *Ibid.* p. 166.

¹¹² *Ibid.* p. 174.

¹¹³ See, e.g. B. Hepple, n. 98 *supra*; Gardner, n. 98 *supra*; Arshi & O'Cinneide, n. 98 *supra*.

¹¹⁴ See, e.g. C. McCrudden *et al.*, n. 8 *supra*, p. 276; M. Arshi & C. O'Cinneide, n. 98 *supra*, p. 74.

remedies is impracticable, or that to mount such a defence would necessarily threaten the social change project. They also fail to acknowledge overtly that an independent social good – the accessibility to individuals of a forum for redress – has been considered and found to be in conflict with, and of secondary importance to, one or more other social goods.

The reform discourse could avoid these three common oversights by taking the following three steps. First, reformers should investigate whether, with regard to a given proposal, the inputs to the system in pursuit of policy implementation will negatively change the dispute resolution outputs of the system. Second, if there will be negative effects, reformers must consider whether their aims could be met outside of the dispute resolution system. This is very important: it asks reformers to ‘think outside the box’, and avoid habitual resort to existing dispute resolution mechanisms as the forum for law enforcement activities. Finally, if the first two steps lead to the conclusion that the proposal must unavoidably have a negative effect on the dispute resolution project, then reformers should engage in a proportionality inquiry, demonstrating that the degree of burden imposed on individual remedies is properly balanced by the social change benefits of the proposal. Following these steps could go a long way to assuring that measures to achieve social change do not unnecessarily or accidentally undermine the accessibility of individual remedies, while acknowledging that often group or societal concerns must take precedence over those of the individual.

5.2. The CEHR Consultation: How Not to Take Account of the Two Projects

If the movement for reform of British equality law marches irresistibly toward rationalisation and harmonisation through a single equality act, then surely the first steps in that campaign have been the consultation on the creation of a single equality commission. Those who care about the dispute resolution project must hope that those steps do not presage the ultimate direction of the movement. Unfortunately, the CEHR consultation process has followed none of the steps proposed above, almost producing results predictably inimical to the interests of non-strategic discrimination victims in Britain. Of course, most of the questions addressed in the consultation process did not have direct impacts on dispute resolution, so a critique of the full consultation falls well outside the scope of this article. However, the consultation process could not avoid addressing the issue of what role the new CEHR should play in the litigation of individual claims, strategic or otherwise. How it did so exemplifies a policy-making process that did not take account of the two projects, and shows why discussions on a single equality act must not repeat the omission.

The question of CEHR representation of individuals ('casework') arose because each of the existing commissions supports individual claims to some degree or another, and each one to a different degree, so a decision was required as to whether and to what extent the CEHR will support individual claims. Government documents prepared to guide the deliberations of the Task Force commissioned to advise the government on such issues reported that the 'primary route for enforcement of anti-discrimination law is for the individual affected to seek redress through the courts... The CEHR's enforcement role needs to complement this.'¹¹⁵ The documents indicated that although a 'full casework service' would have 'a significant bearing on customer satisfaction levels', it would be 'at odds with the strategic approach of the CEHR.'¹¹⁶ Thus, according to the government, the individual claims system had no significant problems that the CEHR need concern itself with. The only relevance of commission support for individual claims was 'customer satisfaction', which could not compete with issues of real concern, like strategic enforcement. Based on such assumptions – Task Force documents reveal no actual investigation of the priority of strategy or the unthreatened health of the individual claims system – the Task Force documents recommended that the CEHR provide support only where the case (1) is likely to clarify important points of law, (2) affects large numbers of people or has 'a significant impact on one or more sectors', (3) flags up a need for legislative change, or (4) involves some special circumstance justifying commission support.¹¹⁷ The Task Force reports acknowledged that this would constitute a retrenchment of commission support for individual claims.¹¹⁸ Following on from the Task Force deliberations, the CEHR White Paper had individuals receiving support only where their cases 'raise a question of principle, affect large numbers of people, or flag up the need for legislative change', dropping any reference to 'special circumstances' (negative reaction eventually forced the government to drop this proposal).¹¹⁹ In its regulatory impact assessment, the White Paper

115 'Powers in Support of the CEHR's Strategic Enforcement Role', CEHR Task Force, 28 January 2004, p. 1 ('Strategic Enforcement').

116 'Supporting Individuals', CEHR Task Force, 28 January 2004, p. 8.

117 'Strategic Enforcement', n. 115 *supra*, pp. 1-2.

118 Both the EOC and CRE can provide support where the claim would be unable to proceed without it, *ibid.*, p. 2.

119 CEHR White Paper, n. 1 *supra*, p. 40. The response to this formalisation of the criteria for supporting individual claims from, among others, the EOC and CRE, was so strongly negative that the government retracted this proposal, leaving the grounds for "casework" provision unspecified, but continuing to emphasise the need for a "strategic" approach. CEHR response, n. 1 *supra*.

reckoned that 'no costs to the individual' would flow from the reduction in commission assistance to individual claims.¹²⁰

Nothing like any of the proposed three steps appeared in the process by which the government reached that decision. Nowhere in the consultation process did the government appear to have investigated whether its proposals might affect the dispute resolution project beyond the obvious diminution in support for some cases.¹²¹ The government did not explore how, for example, emphasising support for strategic cases might raise stakes in the tribunals or create a two-tiered system of relief. It did not consider whether channelling CEHR law enforcement efforts away from dispute resolution mechanisms, perhaps by strengthening the formal investigation power, might make it possible to have separate enforcement and dispute resolution branches within the CEHR.¹²² Most disappointing, however, was the failure of the consultation process to inquire whether the benefits of heightened emphasis on selective strategy justified the concomitant loss of support for individual claims.

The CEHR Task Force document 'Supporting Individuals' represents a neat piece of legerdemain on this issue. The report purported to consider the different approaches of the EOC, CRE and DRC to the provision of support for individual claims, with an eye toward choosing the right balance of strategy as against support. An annex to the report contained data on the commissions' casework activities.¹²³ This data indicates that, for example, the CRE provides tribunal or court representation to around eight times the proportion of race claims that the EOC provides in proportion to all sex and equal pay claims.¹²⁴ However, despite the very different balances struck by these commissions between strategy and individual support, the text of the Task Force report described them both as 'adopting a highly selective process that reflects a strategic approach', and sharing a 'common view that resources are best deployed to support strategic priorities.'¹²⁵ With any distinctions thus airbrushed away, the report sets up three options: full, limited, and no casework. The 'limited' option that splits the two extremes is of course the anointed one, which when fleshed out looks almost exactly like the EOC approach, and distinctly unlike the CRE approach.¹²⁶ In other words, the report manages to point to the very selective EOC model as preferable to that of the CRE without even trying to

120 *Ibid.*, app. B, p. 117.

121 *Ibid.*; *Making it Happen*, n. 45 *supra*.

122 CEHR White Paper, n. 1 *supra*, pp. 42-44; 'Strategic Enforcement', n. 115 *supra*, p. 2.

123 'Supporting Individuals', n. 116 *supra*, annex A, pp. 12-16.

124 *Ibid.*; *ACAS 2002/2003*, n. 77 *supra*, p. 42.

125 'Supporting Individuals', n. 116 *supra*, p. 3.

126 *Ibid.* p. 7-9, 12-15.

demonstrate that the strategic advantages achieved by the EOC outweigh the lost benefits of the CRE's support for individual claims.

The dispute resolution project deserves better than that. For decades the CRE and EOC, with roughly the same statutory authority, have pursued very different approaches. The CRE emphasised formal investigations and the resolution of individual disputes, while the EOC focused on strategic litigation. It may well be that, on balance, the EOC model delivers the best social change return with an acceptable dispute resolution cost, while the CRE model attempts too little policy implementation in favour of helping a negligible number of individual discrimination victims. However, such superiority in approach, if extant, must be proven after investigation of the systemic impacts of strategic emphasis on the accessibility of individual remedies, and after the value of social change dividends is weighed against the burden on rights vindication. Owing to its failure to follow some variation on the proposed three steps, the CEHR consultation process will have arrived at a decision about the balance of strategy and individual support without having considered, for example, whether strengthened formal investigation powers might free up some commission resources for casework support, or whether a CRE-inspired balance might achieve acceptable law enforcement outcomes while preserving some role for the CEHR in helping victims gain redress. Because the government backed down from its prescribed casework criteria, owing to outraged responses to the CEHR White Paper, some of the potential damage was avoided. The government and the participants in the consultation nevertheless missed an opportunity here. The opportunity missed was not so much the opportunity to *have* more CEHR support for individual justice, but the opportunity to investigate and discuss whether that would be a sufficiently valuable part of the CEHR mission to justify some diminution in strategic impact, or a greater investment of resources.

5.3. How to Take Account of the Two Projects

The debate on a single equality act need not miss that kind of opportunity. Seizing the opportunity does not require adopting specific measures; it only requires that reform proposals take proper account of the two projects. Some proposals, however, are more likely than others to advance the social change project without harming dispute resolution. It is of course beyond the scope of this article to apply a 'three steps' analysis to every leading reform proposal, but one can abbreviate that process by looking for ideas that seek to increase pressure for social change without using the dispute resolution system. These include, for example, the imposition of positive duties to promote equality, and deterrent or strategic litigation channelled outside the tribunals.

A persuasive champion of positive duties is Fredman, who recommends that the social change project focus primarily on enforcing duties on companies and public authorities to promote equality among their employees and users.¹²⁷ How these would work is best explained by Fredman and others,¹²⁸ but their primary attribute from a dispute resolution perspective is that enforcement need not involve the tribunals. The CEHR could monitor compliance with positive duties backed by the threat of an order from the county court.¹²⁹ As long as a positive duty scheme does not ask the tribunals to supervise, monitor, or enforce the duties, this approach harbours no apparent threat to accessible and speedy individual rights vindication. Evidence suggests that positive duties have a more reliable and demonstrable effect on the behaviour of the regulated than deterrence.¹³⁰ If this proves true, it would allow the CEHR to consider dispensing with strategic litigation, which could free it to take on a robust dispute resolution role, and would at a minimum remove some high-stakes inputs from the tribunal system. McColgan contributes the suggestion that the positive duty scheme use labour unions, works councils, or other forms of worker representative to help enforce and implement positive duties.¹³¹ This addition appears unlikely to create any problems for individual justice, and could be a fairer and more satisfying way of encouraging workplace dispute resolution than compelling the use of employer-administered discipline and grievance procedures.

Of course, these approaches only accommodate the two projects if they replace popular emphasis on deterrence through the tribunals. This is not to suggest that class actions, high or punitive damages, or CEHR test case litigation should not play a part in equality regulation. Each of those enforcement tools has value to the dispute resolution project. Class actions should be available for large groups of individuals with common grievances who want to reduce the individual burden of litigation through concerted action. High, though perhaps not punitive, damages must be available in some cases to meet the dispute resolution project aim of adequate and appropriate compensation. Even test case litigation serves the dispute resolution project when it clarifies the law and makes actions for individual relief run more smoothly. The challenge is to provide all the

127 S. Fredman, n. 4 *supra*, p. 176-194; 'Generation', n. 22 *supra*, p. 163-167.

128 *Ibid.*; *Seriously*, n. 4 *supra*.

129 *Seriously*, n. 4 *supra*, para. 7.8.

130 C. McCrudden, R. Ford, and A. Heath, 'The Impact of Affirmative Action Agreements', in R. Osborne and I. Shuttleworth, *Fair Employment in Northern Ireland*, Belfast, Blackstone Press, 2004, p. 119-147; *Seriously*, n. 4 *supra*; Hepple Report, n. 5 *supra*, app. 1, para. 9.1, 11.1-11.6.

131 A. McColgan, n. 4 *supra*, p. 133-134.

dispute resolution and social change benefits of such measures without commandeering the employment tribunals to perform functions for which they were not designed.

The contemporary discourse boasts no proposals that meet this challenge directly. The CRE has long urged the government to create a discrimination division in the tribunals, an idea that appears in a modified form in the Hepple Report.¹³² This might ameliorate delay for non-discrimination employment claims, but does not appear likely to eliminate effects from high-stakes litigation. The Hepple Report, among others, recommends meeting the needs of individual victims of discrimination by improving the availability of legal aid.¹³³ Providing such aid is intended to alleviate dispute resolution concerns, presumably so that reform of remedies and enforcement can focus on the social change project without distraction. However, the success of such a policy depends almost entirely on the effects of any enforcement measures directed through the tribunals. Thus, if class actions, CEHR strategic litigation, and exemplary damages in the tribunals lead to US-style delay and legalism, even unlimited legal aid will not eliminate formality or speed up the proceedings, and nobody seriously proposes unlimited legal aid. While no proponent of the dispute resolution project would resist improved legal aid for discrimination victims, such aid should not relieve reformers of the responsibility to consider the impact of social change measures on dispute resolution.

Surprisingly, a proposal floated in 1987 provides the best solution for removing heightened stakes from the tribunals. A report from Justice suggested that the most complex or generally significant of employment cases, around 10 per cent, should go to a new 'Employment Court', referred there on the discretion of tribunal chairs.¹³⁴ This kind of approach could accommodate both projects by preserving the tribunals for quick, cheap, and informal individual rights vindication, while allowing strategic cases to strike blows for social change in a forum suited to that enterprise. From a resource perspective this arrangement makes more sense for discrimination law than for employment law. General employment law does not involve nearly enough social policy implementation to justify a separate court. However, if a new equality act were to direct all discrimination claims to the employment tribunals, as the Hepple Report recommends, an 'Equality Court' might make financial

132 B. Hepple Report, n. 5 *supra*, rec. 37, 41; Clarke & Speeden, n. 65 *supra*.

133 B. Hepple Report, n. 5 *supra*, rec. 46; McCrudden *et al.*, n. 8 *supra*, p. 281-282. At present legal aid is unavailable for employment tribunal cases – other than from the equality commissions.

134 *Industrial Tribunals*, London, Justice (Chairman Bob Hepple), 1987.

sense where an 'Employment Court' did not. Indeed, if reform goes as far as it should – extending anti-discrimination protection beyond employment to education, goods, and services provision, across sex, race, disability, religion, sexual orientation, age, and as yet unspecified grounds – one can see how the tribunals could only hope to provide quick and accessible remedies to all victims of discrimination if an Equality Court were there to handle complex, large-scale, or high damages equality cases with their more far-reaching policy implications.

Any such reforms must of course satisfy EC law. Procedural arrangements cannot, for example, make it easier to vindicate domestic rights than EC rights, attach inferior remedies to EC rights, or impose an insufficient sanction (for deterrent purposes) for the violation of EC law.¹³⁵ Fortunately, an Equality Court for representative (or class), sector-wide, and CEHR-prosecuted litigation need not have the effect of providing more or less protection to EC rights. Channelling cases to the forum best suited to dealing with the characteristics (e.g. relative complexity versus simplicity, single-party versus multi-party) of each case would cut across domestic/EC law lines, and has no obvious tendency to discriminate between the two (unless of course the argument could be made that EC law is inherently more or less complex than British law). Similarly, a CEHR mission stressing enforcement of positive duties, strategic litigation in the Equality Court, and a renewed individual casework role would be completely consistent with the vision of an equality body found in EC directives.¹³⁶

Respecting the two projects requires a regulatory scheme that pursues social change through institutions and procedures designed for that purpose, and provides dispute resolution in forums suited to the resolution of individual claims for relief. The reform discourse in Britain has not acknowledged this claim up to now, and the most recent move toward harmonising anti-discrimination enforcement through the CEHR has missed an opportunity to accommodate the two projects. The impending debate on the content of a new single equality act can remedy these omissions by mainstreaming the two projects into reform discussions, and by choosing measures that implement policy through means other than the employment tribunals and other dispute resolution mechanisms. The ideal suite of proposals features CEHR emphasis on positive duties, the

135 C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989; C-14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891.

136 See, e.g. Council Directive No. 2000/43 on the implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (O.J. 2000, L180/22).

establishment of an Equality Court to administer deterrent, group, and test case litigation, and a healthy provision for legal aid to the victims of discrimination.

6. CONCLUSION

Equality law in Britain is at a crucial juncture, where calls for reform lead ever closer to a single equality act. Blueprints for a new act would extend the scope of anti-discrimination protection – increasing the potential number of claims for relief in the process – and would direct all existing and additional discrimination claims, even those involving provision of education, goods, and services, to the employment tribunals. If the reform movement intends to ask the tribunals to provide for the resolution of all discrimination claims, it must recognise and resist the tendency to expect the tribunals to serve the ends of two separate and often conflicting projects. When the project to promote social change with regard to equality appropriates for its purposes mechanisms originally designed for the resolution of straightforward employment disputes, it runs the risk of rendering those mechanisms unfit for the needs of the dispute resolution project. This risk has become a reality in the US, where the heedless pursuit of social change through the dispute resolution system has driven all but a handful of discrimination victims to private ADR. Signs of a parallel trend have emerged in Britain, making it imperative that the debate over a single equality act take care to respect the individual dispute resolution function of the tribunals and, where possible, avoid making them the primary forum for social policy implementation. The fight against inequality in society must at times take precedence over individual interests where a clash is unavoidable, but the accessibility of avenues for individual rights vindication must not be ignored or taken for granted.